hours of execution . . . and he was **innocent**. The District Court noted that it was able to issue the writ because the petition had been filed before the enactment of the AEDPA.

- Brandon Moon, a model citizen,[15] was misidentified by a rape victim in El Paso, Texas. He was convicted of the rape, and served 17 years in a Texas prison. In 2004 he was freed after DNA evidence conclusively established his innocence.[16]

- Darryl Hunt was convicted of murder and rape in 1984. He spent 20 years fighting to set aside his conviction, thwarted repeatedly by the federal courts. Finally, in 2005, Hunt was freed after DNA evidence conclusively established that he had not committed the crime for which he was sentenced to death.

As the commutation of over 100 death sentences in Illinois tells us, these cases are not unique. There are likely thousands of innocent people in prison. They are there because of ineffective counsel, police and/or prosecutorial misconduct, coerced confessions, suppressed *Brady* material, perjury and sometimes just plain bad

---

[15] Moon was an Army veteran and a college student, and had never been arrested for anything in his life.

[16] When Moon was freed, the prosecutor apologized to him for the many years he had served. This was in a habeas proceeding that one federal court called "patently frivolous." *Moon v. Johnson*, Case No. EP-97-74-H (W.D. Tex. 1999).

luck. But they are **innocent**. Since the advent of DNA testing, thousands of innocent prisoners have won their freedom.

The AEDPA is an effort by Congress to deal with a real crisis in the world, highlighted by the attack on the World Trade Center. It was never intended to be a virtual bar to habeas corpus relief for thousands of innocent people in prison. But that is what it has become.

3. *Dretke v. Haley* highlights the problem.

The facts in *Haley* made it fairly obvious to an objective reader that by the time the case reached this Court, *everyone* knew that Michael Haley was "innocent." Counsel for the Texas prison system acknowledged his innocence at oral argument, albeit claiming that he was only "technically innocent." Admittedly, he was guilty of a crime: felony theft. That conviction earned him a maximum of two years in prison. But as all acknowledge, he was *not* guilty of violating Texas' habitual offender statute. It was under that statute that Haley was sentenced to 16 ½ years.[17]

The Fifth Circuit had held that the "actual innocence" exception to the procedural default rule

---

[17] The State of Texas went to extraordinary lengths to keep a man in prison while knowing that he was innocent. That obviously led Justice Kennedy to comment that "Executive discretion and clemency can inspire little confidence if officials sworn to fight injustice choose to ignore it." 541 U.S. at 400 (Kennedy, J., dissenting).

must be extended to non-capital cases. But in its ruling, this Court avoided that question, so critical to Emerson Davis, and to thousands of others unlawfully confined in prisons across the United States. The Court wrote:

> We are asked in the present case to extend the actual innocence exception to procedural default of constitutional claims challenging noncapital sentencing error. We decline to answer the question in the posture of this case and instead hold that a federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default.
>
> 541 U.S. at 393-94.

Actual innocence should be front and center of any consideration of a habeas corpus petition. And if ineffective counsel caused the actual innocence claim to fail, an innocent man should not be barred by the federal court's refusal to immediately rectify the error when presented with the required proof.

28 U.S.C. § 2255 has become a wall, instead of a gate to § 2241 relief. Congress intended it to

allow innocent prisoners relief; the federal courts are not doing what Congress intended.[18]

Conclusion

No one can seriously argue that our criminal justice system does not arrest, convict, incarcerate and execute innocent persons. It does, and the evidence is overwhelming.[19] The intent of the Congress, when it enacted the limitation on successive habeas corpus petitions in AEDPA, was not to ensure the continued incarceration of innocent people, but to prevent an abuse of the judicial system. Of course one has to be sensitive to the sheer volume of filings in the district courts, and everyone agrees that many of them are indeed frivolous, a colossal waste of judicial resources. But if the federal courts continue to deny judicial relief

---

[18] We cannot rely on the state courts to do it. Michael Haley presented his identical claim to the Texas appellate courts, and they had no difficulty denying the claim.

[19] One would only have to consider the Illinois experience, where there were so many innocent persons on that State's death row that Governor George Ryan commuted all 156 of the remaining death sentences, to avoid the probable execution of any more innocent defendants. Prior to that commutation in 2003, 17 death row inmates in Illinois had been exonerated of their capital crimes in the preceding 30 years, 105 others across the United States. Perhaps Illinois or any other state never really executed an innocent defendant, and perhaps the cases found by Governor Ryan and his Commission on Capital Punishment were the only ones in that State. The odds say otherwise, and we must face the fact that Illinois, and most likely every other state with a capital punishment statute, has put innocent people to death.

to innocent defendants who are serving long prison sentences, the courts participate in the abuse.[20] Efficiency cannot justify false imprisonment.

The gravest of abuses occurs, of course, when the courts allow innocent persons to be executed for crimes they did not commit. But there is not much difference between executing an innocent man and putting an innocent man in prison until he dies of natural causes. As Justice Kennedy wrote in his dissent in *Dretke v. Haley*, "in a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail." 541 U.S. at 399. Certainly the difference between the five year sentence that Emerson Davis should have received and the sentence of life without parole in not a "minor detail." An illegal sentence is not much worse than an illegal conviction. Who among us – prosecutors, judges, even the Justices of this Court – could look such an innocent man in the eye and say, "Tough luck."[21]

This Court should grant the Petition for Writ of Certiorari, to allow it to re-visit the question it did not answer in *Dretke v. Haley*, 541 U.S. 186 (2004):

---

[20] There are apparently no cases since the enactment of AEDPA in which a federal court has found that 28 U.S.C. § 2255 was "inadequate or ineffective."

[21] On reflection, counsel for the Director of the Texas prison system could do it. When asked by Justice Stevens in oral argument if the Haley case – where a man was serving 16 ½ years for a crime that had a 2-year maximum sentence – was not a manifest injustice, counsel said it was not.

whether the actual innocence exception should apply to all cases in which innocent people may be imprisoned.[22]

Respectfully submitted,

Richard L. Wilson
3610 Dubsdread Circle
Orlando, Florida 32804
407.649.9225 (Fax) 423.8727
Email: rwilson14@cfl.rr.com

Counsel for Amicus Curiae

---

[22] We can always parse words, of course, and say that Emerson Davis is not an innocent man, but only someone serving an illegal sentence. When he has completed five years of his sentence – the period of time for which he could have been lawfully sentenced – that becomes somewhat of a "distinction without a difference" to him.